Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MARGIE A. PICKETT,

Petitioner,

v.

PETROLEUM HELICOPTERS, INCORPORATED, EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, AND DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In order to be eligible for compensation benefits under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(b), must a worker suffer injury or death *on* an Outer Continental Shelf (OCS) stationary platform or waters above, i.e., does the OCSLA have an "On the Shelf" situs requirement?

The U.S. Fifth Circuit says YES.

The U.S. Third Circuit says NO.

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Margie Pickett, widow of Joseph Pickett, individually, and on behalf of his dependent child, Michael B. Pickett, respectfully petitions for a Writ of Certiorari to review a Judgment of the United States Court of Appeal for the Fifth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals on the merits (Appendix "A") is reported at 266 F.3d 36. The decision of Administrative Law Judge, Honorable Clement J. Kennington, (Appendix "C") and the Per Curiam Opinion of the Benefits Review Board of the U.S. Department of Labor (Appendix "B") addressing the question presented are unreported.

STATEMENT OF JURISDICTION

On October 25, 2001, the United States Court of Appeals for the Fifth Circuit denied the Petitioner's timely suggestion for Rehearing En Banc, and the Petition for Rehearing by the Panel. (Appendix "D"). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Outer Continental Shelf Lands Act (OCSLA) provides the following definitions at 43 U.S.C. § 1331:

When used in this subchapter —

> (1) The term "development" means those activities which take place following discovery of minerals in paying quantities, including geophysical

> activity, drilling, platform construction, and *operation of all onshore support facilities*, and which are for the purpose of ultimately producing the minerals discovered.

(emphasis ours)

and at 43 U.S.C. § 1333:

> **(b) Longshore and Harbor Workers' Compensation Act applicable; definitions**
>
> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901, *et seq.*]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section —
>
> (1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the Outer Continental Shelf and artificial islands and fixed structures thereon.

STATEMENT OF THE CASE

Pilot, Joseph Pickett, was killed on November 15, 1990 as he lifted helicopter N3536T from a heliport landing pad at Petroleum Helicopters, Inc. (PHI's) Cameron, Louisiana onshore support facility. The helicopter at an altitude of 25 to 30 feet rolled to the right, crashed into the parking lot, ejecting Pickett, who was struck by the rotor blades, causing instant death. Pickett had just commenced a regular voyage for his employer, PHI, who had contracted with Amerada Hess Corporation to provide helicopter transportation of personnel and supplies from the Hess shoreside base, located a short distance away on the banks of Calcasieu River, to numerous stationary platforms located on the Outer Continental Shelf (OCS) used by Hess for the purpose of exploring for, developing, and recovering of the natural resources from the subsoil and seabed of the OCS.

After liftoff from the onshore beach-side PHI heliport, the Outer Continental Shelf (OCS) is only three miles away. Thus, Pickett spent at least 90% of his employment *on* the Outer Continental Shelf. On days when he flew directly offshore, his employment would be at least 99% on the OCS and 1% on land or in State waters. He was truly an offshore lands worker.

Claim was timely filed by Joseph Pickett's widow, Margie Pickett, and her children, for Longshore Workers' Compensation benefits as made applicable by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(3)(b). Pickett's employer chose to pay (lesser) benefits under the Louisiana Workers' Compensation Act (LWCA), L.R.S. 23:1021, *et seq.*

The Honorable Clement J. Kennington, Administrative Law Judge, denied survivor benefits, finding the Fifth Circuit U.S. Court of Appeals' decision in *Mills v. Director OWCP*, 877 F.2d 356 (5th Cir. 1989), required that Pickett's death occur *on* the OCS.

Confronted with prior expressions from the Fifth Circuit Court to the contrary dealing with fatal helicopter crashes, he said:

> Although the Court (5th Cir.), in *Mills*, stated that it did not reverse its prior decisions in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982) or *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), cert. denied sub nom. *Stansbury v. Chevron U.S.A., Inc.*, 459 U.S. 1089 (1982), the effect of its holding was to overrule said decisions. *Id.* at 361. In *Barger*, the Fifth Circuit read the Act, as extended by the OCSLA, as providing an exclusive remedy for the death of a helicopter pilot who regularly engaged in transporting oilfield workers and equipment to an offshore rig on the OCS. 629 F.2d at 338. In *Stansbury*, the Court held 43 U.S.C. §1333(3)(b) "to apply to injuries occurring as a result of the operations described without regard

to the physical situs of the injury." 681 F.2d at 950 (citing *Nations v. Morris*, 483 F.2d 577, 584 (5th Cir. 1973), cer.. denied, 414 U.S. 1071 (1973)). Furthermore, the fifth Circuit stated in *Herb's Welding v. Gray* that they had "adopted a 'but for' test of causation in determining whether a particular injury was the result of operations on the shelf." 766 F.2d 898, 900 (5th Cir. 1985) (citing *Barger*, 692 F.2d at 340; *Stansbury*, 681 F.2d at 951). Coverage applied based on the fact that Claimant would not have been injured "but for" the extractive operations on the shelf. *Herb's Welding*, 766 F.2d at 900.

While this case is certainly distinguishable from *Mills* in that Claimant, unlike the one in *Mills*, performed a substantial amount of his work over water and indeed worked on the OCS, and was thus routinely exposed to the perils of the sea, nonetheless, I am still compelled to follow the Fifth Circuit's holding, which excludes Claimant from coverage as he was over land, albeit rather fortuitously, when the accident occurred. 877 F.2d 356.

The Benefits Review Board concurred.

Petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit (which had jurisdiction pursuant to 33 U.S.C. § 921(c)) and urged the Court to fashion a rule defining an "Offshore Lands Worker" as one whose duties require a substantial presence on the Outer Continental Shelf conducting operations for the purpose of exploring for, developing, removing, recovering of the national resources

from the subsoil and seabed of the OCS. The reasons advanced were (1) this is what plain language of the OCSLA says; and (2) "Offshore Lands Workers" are entitled to the same consideration as afforded maritime seamen in that they should not walk in and out of coverage. Once they acquire eligibility (status), they keep it for the entirety of their employment. *See Offshore Company v. Robinson*, 266 F.2d 779, and *Barrett v. Chevron*, 781 F.2d 1067.

The Fifth Circuit Per Curiam Opinion reaffirmed its position in *Mills*, *supra*, requiring "the injury to occur on the OCS," and "satisfaction of the situs test, even as to helicopter crashes."

Petitioner's Petition for En Banc Rehearing received no votes.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A DIRECT CONFLICT BETWEEN THE THIRD AND FIFTH CIRCUITS.

In *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988), Curtis, a well logging operator who worked offshore New Jersey on the Outer Continental Shelf on the NEW ERA, a semi-submersible drilling rig exploring for oil and gas, was called in to his employer's Rhode Island headquarters. Upon arriving, he was immediately ordered to return offshore. During the early morning hours, he was driving in a company automobile to Atlantic City to meet a helicopter which was to fly him offshore when he was

seriously injured in a head-on collision. Judge Hutchinson opined as follows:

> The only criterion . . . is for injured employees to be involved in "any operations conducted on the Outer Continental Shelf . . . ."

He further noted that Curtis was:

> within the scope of his employment at the time he was injured,
>
> and
>
> "But for" his traveling to the NEW ERA for the purpose of conducting "operations" within §1333(b), employee Curtis would not have sustained injuries in the automobile accident.

Thus, Curtis was granted Worker's Compensation benefits under the OCSLA. The Third Circuit's view is the plain language of the statute has no situs requirement that injury occur on the shelf.

On the other hand, the Fifth Circuit in Petitioner's (Pickett) case followed its decision in *Mills*, *supra*, which "plainly requires satisfaction of the situs test, even as to helicopter crashes," and "allows OCSLA coverage only for employees who suffer injury or death on an OCS platform or the waters above the OCS."

II.

THE PLAIN LANGUAGE OF CONGRESS IN THE OCSLA IS INCONSISTENT WITH THE FIFTH CIRCUIT SITUS REQUIREMENT.

Eligibility for benefits under the U.S. Longshore and Harbor Workers' Compensation Act, 43 U.S.C. § 902, *et seq.* ("LHWCA") is governed as follows:

> § 903. Coverage
>
> (A) Disability or death; injuries *occurring upon navigable waters* of United States.
>
> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of any employee, but only if the disability or death results from an injury *occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.)* **(Emphasis ours)**

From this language, the Supreme Court, beginning in *Northeast Marine Terminal Company, Inc. v. Caputo, et al.*, 97 S. Ct. 2348, 432 U.S. 248 (1977), *for Longshore Cases*, fashioned its status test (engaged in maritime employment) and situs test (occurring upon navigable waters including, etc.) The origin of the situs requirement is Congressional language which clearly requires injury "*upon* navigable waters."

On the other hand, Congress said in the OCSLA (43 U.S.C. § 1333(b)):

> With respect to disability or death of an employee resulting from any *injury occurring as a result of operations conducted on the Outer Continental Shelf* for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act (33 U.S.C.A. 901 et seq.).

(Emphasis ours)

Congress could have *rearranged the above language* and said:

> With respect to disability or death of an employee resulting from any *injury occurring on the Outer Continental Shelf* as the result of ***operations*** conducted for the purpose of exploring for, etc.

If Congress had done this, they would have established a situs requirement (injury or death must occur on the OCS) as they did for Longshoremen . . . but they chose not to do so. Rather, Congress clearly said the injury must occur "as a result of *operations* conducted on the . . . shelf." Thus, we must seek the meaning of "***operations***."

Congress provided at 43 U.S.C. § 1331 Definitions as follows:

> When used in this subchapter —
>
> > (1) The term "development" means those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, platform construction, and *operation of all onshore support facilities*, and which are for the purpose of ultimately producing the minerals discovered.

(Emphasis ours)

Since Pickett was injured in the "operation of an onshore support facility," necessary for oil development on the OCS, the plain language of Congress makes him eligible for Worker's Compensation benefits.

It is fashionable in these times to be ever mindful of judicial responsibility to follow the plain language of Congress. *See Norfolk Shipbuilding and Drydock Corp. v. Garvis*, 121 S. Ct. 1927 (2001). Unfortunately for the Pickett family, the Fifth Circuit has fallen behind.

III.

OFFSHORE LANDS WORKERS SHOULD NOT WALK INTO AND OUT OF COVERAGE.

In *Chandris, Inc., et al. v. Antonios Latsis*, 94-325 (1995) 515 U.S. 347, 115 S. Ct. 2172, 132 L. Ed. 2d 314, 63 USLW 4564, 1995 AMC 1840, this Court said:

> We believe it is important to avoid "engrafting upon the statutory classification of a 'seaman' a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties." *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1075 (CA5 1986) (en banc) (quoting *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347, n. 6 (CA5 1980)). Thus, a worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker has engaged while injured. *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247, 1256 (CA3 1994).

A cardinal principle of maritime seaman status cases is once the test is met, the eligible seaman carries his eligibility even when off the vessel on land so long as the seaman is in the course and scope of his employment.

Thus, the critical question is "why afford a different standard to an Offshore Lands Worker who spends 90% of his time on the OCS and 10% at the land bases?" What is the reasoning that causes him to loose eligibility when his work caused him to not be physically present on the Outer Continental Shelf for 10% of the time? There can be none.

The OCSLA contains no language suggesting departure from the rule enunciated by Justice O'Conner in *Chandris*, *supra*.

43 U.S.C. § 1333(b) of the Outer Continental Shelf Lands Act (OCSLA) also provides as follows:

> (1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof; and
>
> (2) the term "employer" means an employer any of whose employees are employed in such operations.

Under the plain language of Congress, PHI meets the definition of "employer" because it provided helicopter transportation of personnel and supplies for *operations conducted* on the Outer Continental Shelf for developing and removing of the natural resources from the subsoil and seabed of the Outer Continental Shelf, and Pilot Pickett meets the definition of "employee" because he was not a seaman and was "employed in *such operations*."

IV.

NATIONAL IMPORTANCE

Thousands of Offshore Lands workers who begin operations from onshore support bases of the Fifth Circuit (Texas, Louisiana, and Mississippi) are engaged in a dangerous activity. Many suffer injury. They reside on their "days off" with their families throughout the United States, as well as Canada and Mexico. Pilot Pickett was a long-time resident of Colorado. Thus, the implications of the failure of the Fifth Circuit to follow plain Congressional language affects many Americans. Fortunately for the states of the Fifth Circuit, most United States offshore oil development begins from bases there located. Unfortunately, these Offshore Lands workers and their families, under the law as interpreted by the Fifth Circuit, are denied "equal protection" guaranteed by the United States Constitution.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED SEPTEMBER 28, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-60795

MARGIE A. PICKETT (WIDOW OF JOSEPH PICKETT),

Petitioner,

VERSUS

PETROLEUM HELICOPTERS, INC.;
EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY;
DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Review of a Decision of the Benefits Review Board

Before JONES, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:

Margie Pickett appeals a decision of the Benefits Review Board ("BRB") that she does not qualify for death benefits regarding her late husband, Joseph Pickett, under the Longshore and Harbor Workers' Compensation Act

("LHWCA"), as adopted in the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333(b). We affirm.

I.

Joseph Pickett was a helicopter pilot for Petroleum Helicopters, Inc., performing contract services for Amerada Hess Corporation. He ferried workers and equipment between land and offshore platforms. He was killed when his helicopter crashed over land during a test flight.[1]

Margie Pickett filed for benefits under the OCSLA. An administrative law judge ruled Pickett ineligible under OCSLA because his death did not occur over the Outer Continental Shelf ("OCS") and thus did not satisfy this court's situs requirement for OCSLA benefits.[2] Margie Pickett appealed to the BRB, which affirmed.

II.

Margie Pickett concedes that the death did not occur over the OCS but argues that the plain language of OCSLA is inconsistent with this court's situs requirement. Whatever the merits of Pickett's statutory argument, however, we are bound by *Mills v. Director, OWCP*, 877 F.2d 356, 362 (5th

---

1. If the flight test had been successful, the helicopter would have landed, boarded passengers, and ferried the passengers to oil platforms on the OCS.

2. Pickett also sought benefits under the LHWCA. The administrative law judge found — and Margie Pickett does not dispute — that her husband failed to meet the status requirement of the act.

Cir. 1989) (en banc), which allows OCSLA coverage only for employees who "(1) suffer injury or death on an OCS platform or the waters above the OCS; and (2) satisfy the 'but for' status test this court described in *Herb's Welding v. Gray*, 766 F.2d 898, 900 (5th Cir. 1985)." *Accord Sisson v. Davis & Sons*, 131 F.3d 555, 558 (5th Cir. 1998).

Margie Pickett argues that *Mills* is factually distinct and that our earlier decisions therefore should control. We disagree. The relevant language in *Mills* is not fact-specific, but categorically requires the injury to occur on the OCS. In fact, the court discussed the two cases on which Margie Pickett relies:

> The Director argues that we imposed no situs requirement for § 1333(b) coverage in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), and *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir. [1982]) . . . . The Director's reliance on those cases is misplaced.
>
> *Barger* and *Stansbury* held that § 1333(b) extended the LHWCA as the sole remedy for survivors suing the employers of individuals who (1) satisfied the "but for" status test; and (2) died in helicopter crashes on the high seas above the OCS. Although some of the dicta in those opinions may be overly broad, we have no quarrel with those holdings to the extent they grant LHWCA benefits to oilfield workers injured on waters above the OCS. We do not interpret those cases to read § 1333(b) as extending LHWCA benefits

> to oilfield workers injured on land or state territorial waters. *But cf. Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988) (Section 1333(b) covers OCS platform worker injured in car accident on New Jersey Garden State Parkway while driving to meet helicopter that would have flown him to rig).

Mills, 877 F.2d at 361-62. Contrary to Margie Pickett's suggestion, *Mills* plainly requires satisfaction of the situs test, even as to helicopter crashes.

Moreover, Margie Pickett's second contention — that we should follow *Curtis* because "the Court's opinion in *Mills* . . . did not disagree with *Curtis*" — is unpersuasive. *Mills* referenced *Curtis* only as "authority [that] cites a proposition analogous to the contrary of the main proposition." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(c), at 23 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

AFFIRMED.

APPENDIX B — PER CURIAM DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF LABOR BENEFITS REVIEW BOARD DATED OCTOBER 31, 2000

U.S. Department of Labor
Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 00-0288

MARCIE A. PICKETT
(Widow of JOSEPH PICKETT)

Claimant-Petitioner

v.

PETROLEUM HELICOPTERS, INCORPORATED

and

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY

Employer/Carrier-Respondents

DATE ISSUED: OCT 31 2000

DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

* * *

Appendix B

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-1301) of Administrative Law Judge Clement J. Kennington denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant's husband (decedent) was a helicopter pilot for employer. Employer provides helicopter transportation to offshore oil rigs on the outer continental shelf (OCS). Decedent was performing an operational flight check when his helicopter crashed into the employee parking lot from an altitude of 30 feet. Decedent sustained fatal injuries as he was ejected from the helicopter and struck by the blades. Claimant is receiving death benefits under the Louisiana workers' compensation statute, and sought death benefits under the Act, 33 U.S.C. §909.

Following the *en banc* decision of the United States Court of Appeals for the Fifth Circuit in *Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989), the

administrative law judge found that decedent's death is not covered under the OCSLA as the situs of the death was not on the OCS itself. Claimant appeals this finding, and employer responds, urging affirmance.[1]

In *Mills*, the court held that the OCSLA applies to those who "suffer injury or death on an OCS platform or the waters above the OCS" and who "satisfy the 'but for' status test this court described in *Herb's Welding, Inc. v. Gray*, 766 F.2d 898, 900 (5th Cir. 1985)," *Mills*, 877 F.2d at 362, 22 BRBS at 102(CRT), *i.e.*, the injury or death would not have occurred "but for" the extractive operations on the shelf. The claimant in *Mills* suffered an injury during construction of an oil production platform destined for the OCS. The injury occurred in the employer's yard in Amelia, Louisiana. The court held that the claimant could not recover under the OCS, as the "situs" requirement of the OCSLA was not met. The court distinguished its decisions in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983), and *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), *cert. denied*, 459 U.S. 1089 (1982), as in those cases the employees died in helicopter crashes on the high seas over the OCS. As the deaths did not occur on land, and thus were not subject to state workers' compensation laws, the Fifth Circuit held that the decisions did not preclude the result it announced in *Mills*.[2] The *Mills* court reviewed

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1. The administrative law judge also found that there is no coverage under the Longshore Act. *See* 33 U.S.C. §§902(3), 903(a). This finding is not appealed.

2. The court did state that *Barger* and *Stansbury* contained "overly broad" *dicta*. *See* discussion, *infra*.

legislative history and case law decided on other issues involving the OCS, and determined that the federal remedy of the OCSLA is not available to those who have a state workers' compensation remedy. *Mills*, 877 F.2d at 362, 22 BRBS at 102(CRT).

The Fifth Circuit more recently addressed its *Mills* decision in *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998). The claimant in *Sisson* was injured while constructing a guard rail around an employee parking lot at a heliport. The heliport was used for transporting workers and equipment to rigs on the OCS. The court first affirmed the administrative law judge's finding that claimant's injury did not occur on a situs covered under the Longshore Act, 33 U.S.C. §903(a). The court then summarily rejected the contention that claimant was covered under the OCSLA. The court stated:

> Sisson also claims coverage under the OCSLA, 43 U.S.C. § 1333(b). *Mills v. Director, OWCP*, 877 F.2d 356 (5th Cir. 1989) held that an employee had to be injured on the Outer Continental Shelf to obtain LHWCA benefits through the OCSLA. Sisson concedes that he was not so injured. *Mills* forecloses OCSLA relief for Sisson.

131 F.3d at 557, 31 BRBS at 201(CRT).

In contrast, in a decision issued before the *en banc* decision in *Mills*, the United States Court of Appeals for the Third Circuit held that a claimant, injured on a highway in New Jersey on his way to a heliport to be transported to the

OCS, was covered under the OCSLA. The court rejected a situs requirement for OCSLA coverage, and imposed only a "but for" test: would the claimant have sustained injuries "but for" the operations on the shelf. Holding that he would not have, the claimant was found covered. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 21 BRBS 61(CRT) (3d Cir. 1988).

Claimant contends that the reasoning of *Curtis* should be applied to find coverage in this case, inasmuch as the facts of *Mills* and *Sisson* are distinguishable, and therefore the holdings therein are inapplicable. Claimant states that the claimants in *Mills* and *Sisson* never left their land-based employment, whereas her husband regularly flew over the OCS and landed on rigs on the OCS like the claimant in *Curtis*. Claimant hinges her argument on this language from *Mills*:

> *Barger* and *Stansbury* held that §1333(b) extended the LHWCA as the sole remedy for survivors suing the employers of individuals who (1) satisfied the "but for" status test; and (2) died in helicopter crashes on the high seas above the OCS. Although some of the dicta in those opinions may be overly broad, we have no quarrel with those holdings to the extent they grant LHWCA benefits to oilfield workers injured on waters above the OCS. We do not interpret those cases to read §1333(b) as extending LHWCA benefits to oilfield workers injured on land or state territorial waters. *But cf. Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir.1988) (Section 1333(b) covers

Appendix B

> OCS platform worker injured in car accident on New Jersey Garden State Parkway while driving to meet helicopter that would have flown him to rig).

Mills, 877 F.2d at 361-362, 22 BRBS at 102(CRT). Claimant thus contends that the Fifth Circuit did not disagree with *Curtis* on the issue of OCSLA coverage for one who regularly uses helicopter transportation to the OCS, and that the administrative law judge's decision therefore should be reversed.

We reject claimant's argument and affirm the administrative law judge's denial of benefits, as his finding that decedent's death is not covered under the OCSLA is supported by the law of the Fifth Circuit, which is controlling in the instant case. In *Stansbury*, the Fifth Circuit addressed a widow's entitlement to benefits under the OCSLA for the death of her husband in a helicopter crash into the waters over the OCS.[3] The court stated, "We have construed [the OCSLA] to apply to injuries occurring as a result of the operations described without regard to the physical situs of the injury." *Stansbury*, 681 F.2d at 950 (citations omitted). In both *Stansbury* and *Barger*, the court focused solely on the "but for" test, and found it satisfied in that the employees' deaths in helicopter crashes in the waters over the OCS would not have occurred but for the extractive operations on the OCS. The language quoted above from *Stansbury* concerning the absence of a situs test is clearly the *dicta* the *Mills* court

---

3. In both *Stansbury* and *Barger*, the claimants also attempted to recover under the Jones Act, but the helicopters were held not to be "vessels."

referred to as being overbroad; the employees in both *Stansbury* and *Barger* were killed in the waters over the shelf, so there was no need to state that the physical situs of the injury is not relevant. Although the *Mills* court did not expressly state its disagreement with *Curtis*, and merely noted its opposite holding, claimant herein reads too much into this method of citation. With regard to the "situs" requirement of the OCSLA, *Mills* specifically states that the holdings in *Barger* and *Stansbury* are limited to finding OCSLA coverage for "those oilfield workers injured on waters above the OCS." *Mills*, 877 F.2d at 361, 22 BRBS at 102(CRT). The court definitively held that the Act does not extend to those oilfield workers injured on land or in state territorial waters. *Id.*, 877 F.2d at 362, 22 BRBS at 102(CRT). As it is undisputed that decedent's death occurred on land, *Mills* forecloses claimant's recovery under the Act irrespective of the fact that decedent regularly flew over the OCS and landed on rigs on the OCS.[4] *See Sisson*, 131 F.3d at 557, 31 BRBS at 201(CRT).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

---

4. Claimant apparently has a remedy under state law, and the court in *Mills* stated that "As the legislative history makes plain, Congress enacted OCSLA only as a vehicle to fill voids in the rules governing the federally managed territory of the OCS. No such void exists for disputes encompassing areas already governed by state law." 877 F.2d at 359, 22 BRBS at 99(CRT).

Appendix B

SO ORDERED.

s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

s/ Malcolm D. Nelson
MALCOLM D. NELSON, Acting
Administrative Appeals Judge

APPENDIX C — DECISION AND ORDER DENYING BENEFITS OF THE UNITED STATES DEPARTMENT OF LABOR DATED NOVEMBER 15, 1999

U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza Bldg. – Suite 530
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Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

DATE: November 15, 1999

Case No. 1999-LHC-1301

OWCP No. 7-133441

In the Matter of
JOSEPH PICKETT (DECEASED)

Claimant

v.

PETROLEUM HELICOPTERS, INC.

Employer

EMPLOYER INS. OF WAUSAU
A MUTUAL COMPANY

Carrier

* * *

Appendix C

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901, et seq., through the Outer Continental Shelf Lands Act (hereinafter "OCSLA"), 43 U.S.C.A. 1333(3)(b), brought by Margie A. Pickett, the widow of deceased employee Joseph Pickett (hereinafter "Claimant"), against Petroleum Helicopters Inc. (hereinafter "PHI") and Employer Insurance of Wausau A Mutual Company (hereinafter "Carrier"). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 6, 1999, at Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant and Employer testified and introduced eight joint exhibits, which were admitted into evidence (marked JTX-A, B, & C, and D-1 through D-5), including a photographic map of the PHI's Cameron Heliport, which is 500 hundred yards off of the Gulf of Mexico, and the Amerada Hess Heliport, which is adjacent to the Calcasieu River which merges with the lake Charles Ship Channel.[1]

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1. References to the transcript and exhibits are as follows: trial transcript – TR__; Joint exhibits – JTX-__.

Appendix C

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. At all times pertinent herein, PHI a heliport in Cameron, Louisiana, as shown on JTX-A. JTX-B, is a photograph of the PHI Heliport in Cameron, Louisiana. The PHI Heliport is located approximately 500 yards from the Gulf of Mexico. The PHI Heliport has one parking lot, a building used as a gathering center with offices for dispatchers, a shop for tools, supplies for mechanics to maintain the helicopters, and fuel tanks. JTX-C is a photograph of PHI landing pads and helicopters at Cameron. From its heliport, PHI provided helicopter transportation of personnel and supplies for operations conducted on the Outer Continental Shelf (hereinafter "OCS") for the purposes of exploring for, developing, and removing of the natural resources from the subsoil and seabed of the OCS. Additionally, no loading, unloading, repairing or building of vessels is conducted at the PHI base in Cameron.

2. At all times pertinent herein, Amerada Hess Corporation (hereinafter "Hess") maintained a dockside facility in Cameron, Louisiana, adjacent to the East Fork of Calcasieu Pass, a navigable stream, as shown on JTX-A. JTX D-1 through D-5 are photographs of the Hess facility, which has

a dock used by supply vessels, a crane for loading and unloading vessels, office buildings, warehouses, radio towers, and a parking lot. The Hess facility is used by Hess to load and unload vessels in order to conduct its operations on the OCS for the purpose of exploring for, developing, and removing of the natural resources from the subsoil and seabed of the OCS. JTX D-3 & D-3 show parts of the Hess Heliport. Hess had contracted with PHI to have PHI provide helicopter services to transport supplies and personnel for Hess operations conducted on the OCS, where Hess explores for, develops, and removes natural resources from the subsoil and seabed of the OCS. From time to time, PHI used the Hess Heliport in connection with the helicopter services PHI was providing to Hess.

3. The PHI and Hess bases in Cameron facilitated Hess' operations conducted on the OCS, where Hess explores for, develops, and removes natural resources from the subsoil and seabed of the OCS.

4. On November 19, 1990, PHI employee Joseph B. Pickett was the pilot in command of helicopter N3536T. On this date, Pickett lifted his helicopter from a landing pad at PHI's Cameron heliport, intending to perform an operational check flight of the aircraft. Such an operational check flight is required by regulation after maintenance has been performed on the helicopter. Passengers may not be carried in the helicopter until the check flight has been successfully completed. Had the helicopter performed satisfactorily, Pickett intended to fly to the Hess Heliport to pick up personnel and supplies to be transported to Hess fixed offshore platforms on the OCS.

5. Pickett had served PHI for many years in similar piloting operations. Said operations involved either flying between two land points, flying between land and a fixed offshore platform, or flying between two offshore platforms.

6. On November 19, 1990, Pickett lifted the helicopter from the ground in order to perform the operational check flight, but the helicopter did not perform as expected and began to slowly roll to the right. At an approximate altitude of 25 to 30 feet, the helicopter N3536T pointed downward and descended, impacting the ground on its right side, and coming to rest about 175 feet from the point of takeoff in PHI's employee parking lot. Joseph Pickett was ejected and struck by the helicopter blades; thereby sustaining fatal injuries.

7. At the time of his death, Joseph Pickett was lawfully married to and living with his wife, Margie A. Pickett, and one minor child, Michael B. Pickett, born May 5, 1973.

8. During the 52 weeks immediately prior to his death, Joseph Pickett earned $38,004.78, equaling an average weekly wage of $730.86. This figure includes a one time company wide bonus, which was awarded in July 1990 and consisted of an extra two weeks pay. Excluding this bonus from the above figure, Mr. Pickett's gross earnings for the 52 weeks prior to his death totaled $36,679.04, equaling an average weekly wage of $705.37.

9. To date, Wausau Insurance Companies (hereinafter "Wausau") has paid benefits under the Louisiana Workers' Compensation Act (hereinafter "LWCA") as follows:

$119,504.46 in death benefits, $3,000 in funeral expenses and $1,745.82 in medical expenses. Margie Pickett currently receives death benefits under LWCA in the amount of $218.28 a month.

10. Margie A. Pickett claims that benefits should have been paid under 43 U.S.C.A 1333(3)(b) (OCSLA), or 33 U.S.C.A. 901 et seq., (LHWCA).

II. ISSUES

The sole unresolved issue presented by the parties is whether Claimant's injury, which occurred at PHI facility located in the State of Louisiana, is covered by either the Act or OCSLA. (TR 11).

III. STATEMENT OF THE CASE

A. Chronology:

In the issue at hand, Margie A Pickett made a claim for benefits under the Act and OCSLA on behalf of her deceased husband, Joseph Pickett (Claimant). As set for in the stipulations Claimant was employed by PHI as a pilot in command of a helicopter M3536T (TR 9). He was married to Margie A. Pickett with one dependant child, Michael B. Pickett, at the time of his death. On November 19, 1990, Claimant lifted the helicopter from a landing pad at PHI's Cameron Heliport, with the intent of preforming an operational check flight of the aircraft (TR 9). However, the helicopter malfunctioned and crashed to the ground on the PHI base. Claimant was ejected from the helicopter and then struck by the helicopter blades, resulting in a fatal injury (TR 10).

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B. Contention of the Parties

Here I am faced with a relatively simple factual but more complicated legal issue of whether a claimant may satisfy the requirements of the Act, and more specifically OCSLA, by simply suffering an injury on land in preparation for the transport of personnel and supplies to fixed offshore platforms on the OCS. Claimant's widow contends that she is entitled to compensation for death benefits under the Act and OCSLA and that coverage commenced as soon as Claimant began his operational check flight. Employer contends that Claimant's accident is not covered under either the Act or OCSLA because the situs of the accident was at PHI's base located in Louisiana and not the OCS as required under the Act and OCSLA.

IV. DISCUSSION

A. Purposes of the Act

The general purpose of the Act is to aid longshoremen by minimizing the need for litigation to secure compensation for their injuries. *Reed v. S. S. Yaka*, 373 U.S. 410, 415 (1963); *Rodriguez v. Compass Shipping Co. Ltd.*, 451 U.S. 596, 616-17 (1981). The Act is designed to ensure that covered workers are fairly and promptly compensated for claims arising out of their employment. *Donovan v. Washington Metropolitan Area Transit Authority*, 614 F. Supp. 1419, 1420 (D. D.C. 1985), *affd.* 796 F.2d 481 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987); *Vilanova v. United States*, 625 F. Supp. 651, 654 (D.P.R. 1986), *affd in part without op. and vacated on other grounds in part without op.*, 802 F.2d 440 (1st Cir.

1986), *reaff'd*, 851 F.2d 1 (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989) (a fundamental purpose of the Act is to provide employees with a practical and expeditious remedy and at same time to limit economic burden on employers by providing that liability under Act shall be exclusive of all other liability); *Marsala v. Triple A South*, 14 BRBS 39 (1981) (the fundamental intent of the Act is to compensate employees for loss of wage-earning capacity attributable to employment-related injury). The Act has historically been liberally construed in favor of employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia S.B. Co. v. Norton*, 284 U.S. 408, 414 (1932); *Harbor Marine Contracting Co. v. Lowe*, 152 F.2d 845, 847 (2d Cir. 1945), *cert. denied*, 328 U.S. 837 (1946); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

B. Jurisdiction

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature, and not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297,

15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.* In *Perini*, the Supreme Court held that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3). 459 U.S. 297. Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Perini*, 459 U.S. at 323-24. *See also Crapanzano v. Rice Mohawk, U.S. Construction Company, Ltd.*, 30 BRBS 81 (1996); *Nelson v. Guy F. Atkinson Construction Co.*, BRBS 39 (1995) *affd mem. sub nom. Nelson v. Director, OWCP*, No. 95-70333 (9th Cir. Nov. 13, 1996); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992). The situs test limits the geographic coverage of the Act, while the status test is an occupational concept that focuses on the nature of the worker's activities. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999) (en banc).

As a geographical test, situs demands that a longshoreman be injured within a specified area to be covered under the Act. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 222 (4th Cir. 1998). The definition of situs in the Act includes navigable waters, and "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer" in the shipbuilding process. 33 U.S.C. § 903(a). In dealing with claims under OCSLA, the Fifth Circuit has interpreted situs, and hence

coverage, to extend only to accidents or injuries occurring on the OCS. When injuries occur elsewhere they are not covered under OCSLA. *Mills v. Director, OWCP*, 877 F.2d 356 (5th Cir. 1989). Thus, for a claimant to recover under either the Act or OCSLA his accident or injury must occur either in an area defined by 33 U.S.C. § 903(a) or on the OCS.

Although the Court, in *Mills*, stated that it did not reverse its prior decisions in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982) or *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), *cert. denied sub nom. Stansbury v. Chevron U.S.A., Inc.*, 459 U.S. 1089 (1982), the effect of its holding was to overrule said decisions. *Id.* at 361. In *Barger*, the Fifth Circuit read the Act, as extended by the OCSLA, as providing an exclusive remedy for the death of a helicopter pilot who regularly engaged in transporting oilfield workers and equipment to an offshore rig on the OCS. 629 F.2d at 338. In *Stansbury*, the Court held 43 U.S.C. § 1333(3)(b) "to apply to injuries occurring as a result of the operations described without regard to the physical situs of the injury." 681 F.2d at 950 (citing *Nations v. Morris*, 483 F.2d 577, 584 (5th Cir. 1973), *cert. denied*, 414 U.S. 1071 (1973)). Furthermore, the Fifth Circuit stated in *Herb's Welding v. Gray* that they had "adopted a 'but for' test of causation in determining whether a particular injury was the result of operations on the shelf." 766 F.2d 898, 900 (5th Cir.) (1985) (citing *Barger*, 692 F.2d at 340; *Stansbury*, 681 F.2d at 951). Coverage applied based on the fact that Claimant would not have been injured "but for" the extractive operations on the shelf. *Herb's Welding*, 766 F.2d at 900.

Appendix C

While this case is certainly distinguishable from *Mills* in that Claimant, unlike the one in *Mills*, performed a substantial amount of his work over water and indeed worked on the OCS, and was thus routinely exposed to the perils of the sea, nonetheless, I am still compelled to follow the Fifth's Circuit's holding, which excludes Claimant from coverage as he was over land, albeit rather fortuitously, when the accident occurred. 877 F.2d 356.

Claimant cites the Third Circuit case of *Curtis v. Schlumberger Offshore Service, Inc.*, which would support Claimant's contention that coverage began when Joseph Pickett stepped into the helicopter. 849 F.2d 805 (3rd Cir. 1988). In *Curtis*, the Claimant was injured while driving from employer's headquarters to Atlantic City, New Jersey to be helicoptered back to the rig. *Id.* Similarly, in the issue at hand, Claimant was in the process of performing his typical duties as a helicopter pilot for employer, when the helicopter crashed and resulted in fatal injuries. Claimant argues that OCSLA' s statutory language is unambiguous in its lack of situs requirement because it reads to extend coverage to employees who are "injured as the result of operations conducted on the [OCS] . . . for the purpose of . . . developing . . . the natural resources . . . of . . . the [OCS]." *Offshore Logistics, Inc. v. Tallentine*, 477 U.S. 207 (1986); *Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1416 (3rd Cir. 1988). The absence of any geographical limitations in subsection (b) constitutes a justifiable reason to not place such a limit on subsection (b). While *Curtis* provides strong reasons for coverage in this case, I find nonetheless that I am bound by the Fifth's Circuit's decision in *Mills* inasmuch as the accident and proceeding occurred in the 5th Circuit. 877 F.2d 356.

Since OCSLA does not provide coverage, the question remains as to whether the Act otherwise provides coverage for Claimant's injury. In order to establish coverage under the Act Claimant again must establish an appropriate situs. The Fifth Circuit has held in accord with congressional purpose that a site can satisfy the requirements of the Act as long as it is close to or in the vicinity of navigable waters and is customarily used in loading, unloading, repairing a vessel. *See* 33 U.S.C. § 903(a). However, in *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 557, 558 (5th Cir. 1998) the Fifth Circuit held that a parking lot constructed at a heliport to transport personnel to offshore platforms was not a situs customarily used to load vessels because neither fixed platforms nor helicopters were vessels and thus did not satisfy the situs requirement of the Act. In this case the situs of the injury is similar to *Sisson* and compels a finding of no coverage because it was not site customarily used to load, unload, repair or build vessels.

C. Conclusion

In conclusion, I find that Employer is not responsible to Margie A. Pickett, on behalf of decedent Joseph Pickett, for compensation pursuant to the LHWCA through the OCSLA for death benefits as a result of fatal injuries suffered to Claimant when the helicopter he was piloting crashed to the ground on employer's premises because the situs of the accident was neither on the OCS nor at a location customarily used to load, unload, repair or build vessels. Obviously, the significance of situs and how situs is defined is of paramount importance in determining whether coverage exists. Under Fifth Circuit precedent Claimant cannot establish coverage

because of a lack of proper situs. While coverage could certainly be found under the Third Circuit's ruling in *Curtis*, both the injury and the proceedings took place in Louisiana within the Fifth Circuit's jurisdiction mandating application of Fifth Circuit precedent.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and the record in its entirety, I enter the following order:

Claimant, Margie A Pickett's claim on behalf of decedent, Joseph Pickett, for benefits pursuant to the Act via the OCSLA is **DENIED**.

ORDERED this 15th day of November 1999, at Metairie, Louisiana.

s/ Clement J. Kennington
CLEMENT J. KENNINGTON
Administrative Law Judge

APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 25, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60795

MARGIE A PICKETT,
(Widow of Joseph Pickett)

Petitioner

v.

PETROLEUM HELICOPTERS INCORPORATED; EMPLOYERS INSURANCE OF WAUSAU, A Mutual Company; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR

Respondents

Petition for Review of an Order of the
Benefits Review Board

ON PETITION FOR REHEARING EN BANC
(Opinion September 28, 2001, 5 Cir., __, __ F.3d __)

Before JONES, SMITH and DeMOSS, Circuit Judges.

Appendix D

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge

Supreme Court, U.S.
FILED
FEB 14 2002
OFFICE OF THE CLERK

No. 01-1042

IN THE

Supreme Court of the United States

MARGIE A. PICKETT,

Petitioner,

v.

PETROLEUM HELICOPTERS, INCORPORATED, WAUSAU INSURANCE COMPANIES, AND DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PETROLEUM HELICOPTERS, INC. AND WAUSAU INSURANCE COMPANIES

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Petroleum Helicopters, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent, Wausau Insurance Companies, is not a stock corporation. Its parent companies are: Employers Insurance of Wausau, a Mutual Company; Wausau Underwriters Insurance Companies; Wausau General Insurance Company; and Wausau Business Insurance Company.

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STATEMENT OF THE CASE

A. Background

At all times pertinent herein, Petroleum Helicopters, Inc. (PHI) maintained a heliport in Cameron, Louisiana. From its heliport, PHI provided helicopter transportation of personnel and supplies for operations conducted on the outer Continental Shelf for the purposes of exploring for, developing, and removing of the natural resources from the subsoil and seabed of the outer Continental Shelf. In addition, at all times pertinent herein, Amerada Hess Corporation (hereinafter "Hess") maintained a dockside facility in Cameron, Louisiana, adjacent to Calcasieu Pass, a navigable stream. Hess had contracted with PHI to have PHI provide helicopter services to transport supplies and personnel for Hess operations conducted on the outer Continental Shelf, which Hess operations were for the purpose of exploring for, developing, and removing of natural resources from the subsoil and seabed of the outer Continental Shelf.

On November 19, 1990, PHI employee Joseph B. Pickett was the pilot in command of helicopter N3536T. On this date, Pickett lifted his helicopter from a landing pad at PHI's Cameron heliport with the intent of performing an operational check flight of the aircraft, which is required by regulation after maintenance has been performed on the helicopter. Passengers may not be carried in the helicopter until the check flight has been successfully completed. Had the helicopter performed satisfactorily, it was Pickett's intent to then fly to the heliport located at the Hess facility to pick up personnel and supplies to be transported to Hess fixed offshore platforms on the outer Continental Shelf.

On November 19, 1990, Pickett lifted the helicopter from the ground in order to perform the operational check flight, but the helicopter did not perform as expected and began to slowly roll to the right. At an approximate altitude of 25 to 30 feet, the helicopter N3536T pointed downward, then descended and impacted the ground on its right side, coming to rest about 175 feet from the point of takeoff in the employee parking lot of the PHI base. Pilot Joseph Pickett was ejected and during the accident sequence was struck by the helicopter blades, thereby sustaining fatal injuries. At the time of his death, Joseph Pickett was lawfully married to and living with his wife, Margie A. Pickett, the petitioner in this case, and one minor child, Michael B. Pickett, born May 5, 1973.

Subsequent to the above-referenced accident, Wausau Insurance Companies (Wausau), PHI's worker's compensation carrier, paid benefits to petitioner under the Louisiana Workers' Compensation Act, and she currently continues to receive such benefits. However, petitioner has taken the position that benefits should have been paid under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.A. § 901, *et seq.*, through the provisions of the Outer Continental Shelf Lands Act that adopt the provisions of the LHWCA.

B. Decisions of the Lower Courts

Petitioner Margie Pickett sought benefits pursuant to the LHWCA as adopted in the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(b). A hearing was held on October 6, 1999 before the Honorable Clement J. Kennington, Administrative Law Judge, and post-hearing briefs were filed by the parties. After considering the facts and the applicable law, Judge Kennington issued a Decision

and Order Denying Benefits on November 15, 1999. Therein, Judge Kennington concluded that the petitioner was not entitled to LHWCA benefits through OCSLA because the accident in question did not occur on the outer Continental Shelf.[1]

Petitioner appealed Judge Kennington's decision to the Benefits Review Board. On October 31, 2000, the Benefits Review Board issued a Decision and Order affirming Judge Kennington's ruling, concluding that such ruling was supported by the jurisprudence of the United States Court of Appeals for the Fifth Circuit, which was controlling.

Petitioner next filed her Petition for Review in the United States Court of Appeals for the Fifth Circuit. On September 28, 2001, the Fifth Circuit issued an opinion in which it affirmed the decision of the Benefits Review Board in favor of PHI and Wausau. *Pickett v. Petroleum Helicopters, Inc.*, 266 F.3d 366 (5th Cir. 2001). Following its prior precedent in *Mills v. Director, OWCP*, 877 F.2d 356 (5th Cir. 1989) (en banc), the Fifth Circuit concluded, as had the lower courts, that petitioner was not entitled to benefits through the LHWCA as adopted by OCSLA because the decedent's accident did not occur on the outer Continental Shelf. *Pickett*, 266 F.3d at 368. Following the issuance of this opinion, petitioner filed a Petition for Rehearing En Banc with the Fifth Circuit, which was denied by that court on October 25, 2001.

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1. Although counsel for petitioner had acknowledged at the hearing that decedent was not a longshoreman and thus the status requirement of the LHWCA was not met, Judge Kennington nevertheless addressed the question of whether petitioner was directly entitled to LHWCA benefits and concluded that she was not directly entitled to such benefits because the situs of the accident did not satisfy the requirements of that statute. Petitioner did not appeal this aspect of Judge Kennington's decision.

Petitioner then filed her Petition for a Writ of Certiorari asking this Court to review the decision of the Fifth Circuit on the issue of whether she is entitled to receive benefits pursuant to the LHWCA through the OCSLA.

REASONS FOR DENYING THE WRIT

PHI and Wausau submit that the Petition for Writ of Certiorari filed by petitioner should be denied. The decision of the Fifth Circuit, wherein it concluded that LHWCA benefits are not available pursuant to OCSLA unless the accident out of which the claim for benefits arose occurred on the outer Continental Shelf, is supported by the language of OCSLA and the underlying purposes sought to be achieved by Congress in enacting OCSLA. For this same reason, there is no support in either the text or the legislative history of OCSLA for petitioner's suggestion that this Court should create a class of worker called the "Offshore Lands Worker" pursuant to which LHWCA benefits would be payable to any worker who spends a substantial portion of his work time on the outer Continental Shelf and who is injured while in the course and scope of his employment, regardless of whether he is present on the Shelf at the time of such injury. Creation of such a class of workers would in fact be contrary to the purposes sought to be achieved by OCSLA, a statute that was clearly intended to govern a geographical location rather than a certain class of workers. Finally, although petitioner contends that the Court should grant the writ in order to resolve a conflict between the Fifth Circuit and the Third Circuit on this issue, PHI and Wausau submit that this "conflict" between the circuits is not sufficiently significant in proportion to justify this Court's consideration of the issue at this time. When the Third Circuit decided *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir.

1988), it relied heavily on prior Fifth Circuit jurisprudence, as well as one Ninth Circuit case, all of which it interpreted as supporting its conclusion that an outer Continental Shelf situs was not a prerequisite for recovery of LHWCA benefits pursuant to the LHWCA. Subsequently, however, the Fifth Circuit has consistently held that recovery of LHWCA benefits through OCSLA is *only* permitted if the employee was injured or killed on the outer Continental Shelf. It is believed that in view of such jurisprudence, as well as subsequent Ninth Circuit jurisprudence providing support for the Fifth Circuit's view, the Third Circuit, if faced with this issue today, would decide such issue in the same manner as the Fifth Circuit. For these reasons, discussed more fully below, PHI and Wausau submit that the instant case does not present a situation where intervention by this Court is necessary or justified.

I.

THE TEXT OF OCSLA AND THE PURPOSE SOUGHT TO BE ACHIEVED BY CONGRESS IN ENACTING SUCH STATUTE SUPPORT A CONCLUSION THAT AN OUTER CONTINENTAL SHELF SITUS IS A PREREQUISITE FOR RECOVERY OF LHWCA BENEFITS THROUGH OCSLA

Although petitioner argues that an outer Continental Shelf situs is not a prerequisite to recovery of LHWCA benefits through OCSLA, the text of OCSLA and the purpose sought to be achieved by Congress in enacting such statute support a contrary conclusion.

The LHWCA provides, in pertinent part, as follows:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of any disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building, way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a). Petitioner has acknowledged that decedent was not a longshoreman and that, accordingly, she is not entitled to recover benefits under the LHWCA directly. Instead, petitioner argues that she is entitled to LHWCA benefits pursuant to OCSLA, which provides, in pertinent part, as follows:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901, *et seq.*]

43 U.S.C. § 1333(b).

Although it might be argued that the above-quoted language does not clearly communicate that an outer Continental Shelf situs for the accident giving rise to the claim for benefits is a prerequisite to entitlement to LHWCA benefits through section 1333(b), it is abundantly clear from both the text of OCSLA as a whole and the jurisprudence interpreting such statute that Congress intended, by enacting such statute, to provide for the law to be applied to only a limited geographical area. With regard to the Congressional policy sought to be furthered by enactment of OCSLA, 43 U.S.C. § 1332 provides, in pertinent part, that "[it] is hereby declared to be the policy of the United States that . . . the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act . . ." 43 U.S.C. § 1332(1). In the same section, it becomes evident that the statute was intended to regulate the important natural resources that are located on the outer Continental Shelf; the section provides that it is also the policy of the United States that "the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs. . . ." 43 U.S.C. § 1332(3). There is certainly no suggestion, in the policy considerations set forth in 43 U.S.C. § 1332, that OCSLA was intended in any manner to dictate the substantive laws to be applied with respect to matters occurring within the geographical boundaries of the states. Rather, as has been recognized by this Court, "[t]he purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil and the fixed structures . . . on the outer Continental Shelf." *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 355 (1969).

It is likewise clear that Congress, in enacting OCSLA, intended to fill what it perceived to be voids in the law applicable to such geographic areas. In *Rodrigue*, this Court discussed the legislative history of OCSLA and noted that in the debate in the Senate concerning the statute, it was recognized that

> the problem addressed by the committee had been raised by "the fact that the full development of the estimated values in the shelf area will require the efforts and the *physical presence of thousands of workers on fixed structures in the shelf area*. Industrial accidents, accidental death, peace, and order" present problems requiring a body of law for their solution.

Rodrigue, 395 U.S. at 358 (emphasis added). Accordingly, Congress enacted 43 U.S.C. § 1333(a)(2)(A), which adopted state law as surrogate federal law where not inconsistent with existing federal law. Such section provides, in pertinent part, as follows:

> To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State now in effect or hereafter adopted, amended or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended

> seaward to the outer margin of the outer Continental Shelf. . . .

In order to further fill the void with regard to law applicable to the outer Continental Shelf, Congress determined that workers injured on the Shelf should be governed by a worker's compensation scheme. Accordingly, 43 U.S.C. § 1333(b) was enacted to adopt the LHWCA by reference. Such provision states, in pertinent part, as follows:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, of the subsoil and seabed of the outer Continental Shelf compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. . . .

Petitioner contends that there is nothing in section 1333(b) that precludes the interpretation that she accords to this provision, that is, that LHWCA benefits should be payable pursuant to this provision to any worker who spends a substantial portion of his work time on the outer Continental Shelf and who is injured while in the course and scope of his employment, regardless of whether he is present on the Shelf at the time of such injury. However, it should also be noted that there is nothing in section 1333(b) that lends any support for such a novel interpretation of this provision. Further, although the language utilized in section 1333(b), "resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf," may not be a model of clarity, this language cannot be read in a vacuum,

but must be interpreted in conjunction with the other provisions of section 1333 and the legislative history of the statute as a whole. Section 1333, concerning applicable law, contains numerous subdivisions other than section 1333(b) (which adopts the provisions of the LHWCA), yet none of the other subsections purport to extend beyond the boundaries of the outer Continental Shelf itself. Subsection (a) of section 1333, which establishes the substantive law to be applied to the outer Continental Shelf, only applies to activity that occurs on the Shelf; subsection (c) applies the National Labor Relations Act to unfair labor practices *on platforms on the outer Continental Shelf*; subsection (d) provides the Coast Guard with authority to promulgate rules and regulations with respect to safety matters *on the platforms on the outer Continental Shelf and adjacent waters*; subsection (e) accords authority to the Secretary of the Army to prevent obstruction to navigation to the platforms on the *outer Continental Shelf*; and subsection (f) provides that the foregoing provisions are not exclusive and should not be read to exclude the application of other federal laws to the *subsoil and seabed of the outer Continental Shelf and platforms on such Shelf or to acts or offenses occurring or committed thereon*. When Section 1333(b) is considered in light of the application of the other provisions in section 1333 and the legislative intent to develop a body of law to be applied to a specific geographic area, that is, the outer Continental Shelf, it cannot be doubted that the intent of Congress in enacting Section 1333(b) was to allow recovery of benefits under the LHWCA to workers or their survivors who are injured or killed *on the outer Continental Shelf*.

This conclusion is strengthened by the fact that it was the intent of Congress, in enacting OCSLA, to fill voids in the substantive law to be applied to the outer Continental

Shelf. Inasmuch as no void existed with respect to the applicable compensation scheme for workers killed or injured within the territorial boundaries of a state, there was no reason for Congress to draft Section 1333(b) in a manner that would provide for application of the LHWCA beyond the geographic boundaries of the outer Continental Shelf. This Court's decision in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) contains language supporting this conclusion. In *Tallentire*, this Court refused to apply 43 U.S.C. § 1333(a) to platform workers who were not killed on the platform but were killed miles away in the high seas, pointing out that "Congress determined that the general scope of OCSLA's coverage, like the operation of DOHSA's remedies, would be determined *principally by locale, not by the status of the individual injured or killed*." *Id.* at 219 (emphasis added). The Court went on to observe in a footnote that "[o]nly one provision of OCSLA *superimposes a status requirement on the otherwise determinative OCSLA situs requirement*; § 1333(b) makes compensation for the death or injury of an 'employee' resulting from certain operations on the Outer Continental Shelf payable under the Longshoremen's and Harbor Workers' Compensation Act." *Id.* at 119 n.2 (emphasis added). By stating that in section 1333(b) the requirement of employee status was "superimposed" on the "otherwise determinative OCSLA situs requirement," this Court clearly expressed a belief that application of section 1333(b) required *both* an employee status *and* an outer Continental Shelf situs. *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 471 (1992), wherein this Court observed that "[t]he platform [on which plaintiff suffered injury] was located on the Outer Continental Shelf, *an area subject to the [LHWCA]*." (emphasis added). Thus, the Fifth Circuit's conclusion that an outer Continental Shelf accident situs is a necessary prerequisite to recovery of LHWCA benefits

through OCSLA is not only consistent with the text and purpose of OCSLA, but is also consistent with language found in the decisions of this Court.

II.

NEITHER THE LANGUAGE OF OCSLA NOR THE LEGISLATIVE HISTORY OF SUCH STATUTE SUPPORTS PETITIONER'S SUGGESTION THAT THIS COURT SHOULD CREATE A CLASS OF WORKER CALLED THE "OFFSHORE LANDS WORKER"

It is respectfully submitted that there is nothing in the text of 43 U.S.C. § 1333, or in the legislative history of OCSLA, that supports petitioner's suggestion that this Court should create a class of worker called the "Offshore Lands Worker" pursuant to which LHWCA benefits would be payable to any worker who spends a substantial portion of his work time on the outer Continental Shelf and who is injured while in the course and scope of his employment, regardless of whether he is present on the Shelf at the time of such injury. Rather, creation of such a class of workers would be contrary to the text of OCSLA as well as the public policy sought to be advanced by enactment of OCSLA, a statute which, as discussed above, is clearly intended to govern a geographical location rather than a certain class of workers.

Further, petitioner's attempt to liken her suggested class of "Offshore Lands Workers" to seaman's status under the Jones Act must fail. Petitioner points out that a Jones Act seaman does not "walk in and out of coverage," but rather keeps his status as a seaman even when he is on land, as long as he is in the course and scope of his employment.

Petitioner goes on to suggest that there is no reason to accord different treatment to the "Offshore Lands Worker" who spends a substantial portion of his time on the outer Continental Shelf, and that he too should keep his status even when not present on the Shelf. Petitioner's argument, however, ignores a fundamental difference between the purpose of OCSLA and the purpose of the Jones Act. The Jones Act is, by its terms, status oriented; that is, it creates a right of action in favor of "any seaman" who suffers injury or death in the course of his employment. 46 U.S.C. § 688. Thus, Congress, in enacting the Jones Act, created the status of "seaman," although it left to the courts the burden of developing an appropriate definition for this term. OCSLA, on the other hand, does not provide a right to be accorded to individuals with a certain status; rather, as is discussed above, it was enacted to provide for the law to be applied to a certain geographical area, that is, the outer Continental Shelf. Thus, whereas the courts by necessity must interpret the term "seaman" in order to apply the Jones Act, there is nothing in OCSLA that invites or requires the courts to create a class of workers such as the "Offshore Land Workers" class advocated by petitioner.

III.

THE "CONFLICT" BETWEEN THE CIRCUITS ON THE ISSUE OF WHETHER AN OUTER CONTINENTAL SHELF SITUS IS NECESSARY FOR RECOVERY OF LHWCA BENEFITS THROUGH OCSLA IS NOT SUFFICIENTLY SIGNIFICANT IN PROPORTION TO JUSTIFY THIS COURT'S CONSIDERATION OF SUCH ISSUE

Petitioner contends that this Court should grant the writ in order in order to resolve a conflict between the Fifth Circuit and the Third Circuit on the question of whether an outer Continental Shelf situs is a prerequisite to recovery of LHWCA benefits through OCSLA. Although PHI and Wausau acknowledge that, as the jurisprudence now stands, there exists a conflict between the Fifth and Third Circuits on this issue, such conflict certainly does not obligate this Court to grant the writ sought by petitioner. Rather, the Court certainly may, in its vast discretion, refuse to grant such writ, U.S. Sup. Ct. R. 10, and PHI and Wausau submit that such a denial is warranted in this case. The "conflict" between the circuits is simply not sufficiently significant in proportion to justify this Court's consideration of the issue at this time, particularly inasmuch as it seems probable that, if faced with the issue today, the Third Circuit would decide such issue in the same manner as the Fifth Circuit.

In support of its contention that a conflict among the circuits exists that should be resolved by this Court, petitioner relies heavily on the 1988 decision of the Third Circuit in *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988), wherein such Court concluded that an injured employee or his survivors could recover LHWCA benefits through OCSLA even where the accident did not occur on

the outer Continental Shelf, as long as it could be said that the accident would not have occurred "but for" operations on the outer Continental Shelf. *Id.* at 811. Significantly, however, in reaching this conclusion the Third Circuit heavily relied on prior cases that had been decided by the Fifth Circuit, including *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982) and *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir. 1982), as well as one Ninth Circuit case, *Kaiser Steel Corp. v. Director, Office of Workers' Compensation Programs*, 812 F.2d 518 (9th Cir. 1986). Despite the fact that these cases (as well as other cases cited by the *Curtis* court) involved accidents that occurred on a platform on the outer Continental Shelf or in the waters above the Continental Shelf and thus were distinguishable from the factual scenario presented to the court in *Curtis*, nevertheless the court interpreted language found in these cases as supporting a conclusion that LHWCA benefits could be recovered through OCSLA even where the accident occurred on land, as long as the "but for" test was met. Accordingly, it found that plaintiff, who had been involved in a vehicular collision on a New Jersey highway while driving to Atlantic City to meet the helicopter that was to fly him to an offshore drilling rig, was entitled to recover LHWCA benefits.

Since *Curtis* was decided, the Fifth Circuit has consistently held that recovery of LHWCA benefits through OCSLA is *only* permitted if the employee was injured or killed on an outer Continental Shelf situs, that is, on a platform located on, or in the waters above, the outer Continental Shelf. *See Mills v. Director, OWCP*, 877 F.2d 356, 361-62 (5th Cir. 1989) (en banc); *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 558 (5th Cir. 1998); *Demette v. Falcon Drilling Co.*, 2002 U.S. App. LEXIS 745 *12-13 (5th Cir. 1/16/02). This requirement was first enunciated by the

Fifth Circuit in *Mills*. In that case, claimant was a land-based welder who was injured while building an offshore oil platform in Amelia, Louisiana. Claimant sought to recover LHWCA benefits through OCSLA. On appeal of the BRB's denial of such benefits, a panel of the Fifth Circuit initially reversed, concluding that

> Mills qualified for workers' compensation benefits under OCSLA because (1) he would not have been injured but for operations on the OCS; and (2) his welding work during platform construction "furthered the operation of a fixed rig on the shelf and . . . [occurred] in the regular course of extractive operations on the shelf.

Mills, 877 F.2d at 358 (discussing panel's decision). Thereafter, however, the Fifth Circuit granted a rehearing *en banc* and affirmed the findings of the BRB, concluding that claimant was not entitled to LHWCA benefits through OCSLA because he did not satisfy the "situs-of-injury" requirement for such coverage. *Id.* at 357. In reaching this conclusion, the court explained as follows:

> The Director argues that we imposed no situs requirement for § 1333(b) coverage in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), and *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), *cert. denied sub nom. Stansbury v. Chevron U.S.A., Inc.*, 459 U.S. 1089, 103 S. Ct. 573, 74 L. Ed. 2d 935 (1982). The Director's reliance on those cases is misplaced.
>
> *Barger* and *Stansbury* held that § 1333(b) extended the LHWCA as the sole remedy for survivors suing

> the employers of individuals who (1) satisfied the "but for" status test; and (2) died in helicopter crashes on the high seas above the OCS. Although some of the dicta in those opinions may be overly broad, we have no quarrel with those holdings to the extent they grant LHWCA benefits to oilfield workers injured on waters above the OCS. *We do not interpret those cases to read § 1333(b) as extending LHWCA benefits to oilfield workers injured on land or state territorial waters.* But cf. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988) (Section 1333(b) covers OCS platform worker injured in car accident on New Jersey Garden State Parkway while driving to meet helicopter that would have flown him to rig).
>
> *Given that congress intended to establish a bright-line geographic boundary for § 1333(b) coverage, we now draw that line. We hold that LHWCA coverage as extended under § 1333(b) applies to employees who (1) suffer injury or death on an OCS platform or the waters above the OCS; and (2) satisfy the "but for" status test this court described in Herb's Welding, Inc. v. Gray, 766 F.2d 898, 900 (5th Cir. 1985).* As a land-based worker injured on Louisiana soil, Mills must look to state compensation laws for his benefits.

Id. at 361-362 (emphasis added). Thus, in *Mills* the Fifth Circuit clearly held that a claimant who does not suffer injury or death either on an outer Continental Shelf platform or the waters above the outer Continental Shelf simply cannot recover LHWCA benefits by virtue of OCSLA.

This situs requirement for LHWCA through OCSLA was subsequently confirmed by the Fifth Circuit in *Sisson*, *supra*, a case that is particularly analogous to the instant case. In *Sisson*, plaintiff injured his back carrying a piece of drill pipe while he was constructing a guardrail around a parking lot for Gulf Oil Exploration, a company with whom his employer contracted. The parking lot was at a heliport used by Gulf Oil to transport crewmen to oil platforms on the outer Continental Shelf. The injury site was approximately one mile from the Gulf dock and fifty yards from navigable waters. In the first part of the opinion, which is no longer relevant to the instant case, the Court concluded that plaintiff was not directly entitled to LHWCA coverage, based on the fact that the parking lot was not customarily used in loading, unloading, repairing or building a vessel. *Sisson*, 131 F.3d at 557-8. The court then proceeded to address the plaintiff's claim that he was nevertheless entitled to LHWCA benefits through OCSLA. The court summarily concluded that plaintiff was not entitled to such benefits, noting that in *Mills*, it had held that an employee had to be injured on the outer Continental Shelf to obtain LHWCA benefits through OCSLA. *Mills* foreclosed OCSLA relief for plaintiff because plaintiff was not injured on the outer Continental Shelf. *Id.* at 557.

After its decision in the instant case, confirming the situs requirement for recovery of LHWCA benefits through OCSLA, the Fifth Circuit most recently confirmed its position once again in *Demette*, 2002 U.S. App. LEXIS 745, wherein it stated that "[i]n order for the LHWCA to apply by virtue of section 1333(b) . . . the injured worker must satisfy the status requirement of section 1333(b) as well as the situs requirement of section 1333(a)(1)." *Id.* at *12-13.

Subsequent to the time the Third Circuit rendered its decision in *Curtis*, the Ninth Circuit has also clarified its position on this issue. As is noted above, the *Curtis* court had relied in part on the decision of the Ninth Circuit in *Kaiser Steel Corp.*, *supra*, decided in 1987. In *Kaiser*, the plaintiff was injured while he was working as a pipefitter/welder on a platform that was being constructed on the outer Continental Shelf. In connection with its determination that such plaintiff was entitled to recover LHWCA benefits through OCSLA, the court utilized some overly broad language, stating that

> [i]n the absence of any other limitation on the face of the statute or in the legislative history of the Lands Act, section 1333(b) should be construed as extending Longshore Act coverage to all victims of disabling or fatal injuries sustained while working to develop the mineral wealth of the OCS.

Kaiser Steel Corp., 812 F.2d at 522. This language, taken literally, might be interpreted to support a conclusion that LHWCA benefits through OCSLA may very well be recovered even where the accident occurred on land, and indeed, it is this language that the *Curtis* court cited in support of its conclusion in this regard. However, language in subsequent Ninth Circuit decisions reveals that such an interpretation was not intended. In *Saif Corporation/Oregon Ship v. Johnson*, 908 F.2d 1434 (9th Cir. 1990), the court concluded that plaintiff, who had been exposed to asbestos while he was working on a ship building way, was not entitled to recover LHWCA benefits directly under such statute because the building way was not located on navigable waters and was not a dry dock, so the situs did not meet the

requirements of the LHWCA. In distinguishing certain cases cited by plaintiff, the Ninth Circuit discussed *Kaiser Steel Corp.* as follows:

> In *Kaiser Steel Corp. v. Director, OWCP*, 812 F.2d 518 (9th Cir. 1987), the claimant was injured while working on a "stationary, offshore oil platform under construction." *Id.* at 520. When we held there was coverage in that case, we were actually construing the Lands Act, 43 U.S.C. § 1333(b), which extended the "scope of coverage provided by the Longshore Act to include certain employees injured in the course of their work on the [Outer Continental Shelf.]" *Id.* at 520. This case does not involve an injury which occurred on the Outer Continental Shelf.

Id. at 1438. In view of the fact that the Ninth Circuit distinguished *Kaiser Steel Corp.* on the grounds that the case before it "d[id] not involve an injury which occurred on the Outer Continental Shelf," it is clear that the Ninth Circuit did not intend *Kaiser Steel Corp.* to stand for the proposition that LHWCA benefits might be recovered through OCSLA where the accident did not occur on the outer Continental Shelf. More recently, in *A-Z International v. Phillips*, 179 F.3d 1187 (9th Cir. 1999), the Ninth Circuit discussed the fact that the ALJ, in the case before it, had denied plaintiff's claim of LHWCA benefits through OCSLA on the grounds that plaintiff was not injured on the offshore platform as alleged and thus did not meet OCSLA's situs requirement. In a footnote the court observed that "[t]he situs requirement is a predicate for coverage under OCSLA." *Id.* at 1189 n.1.

It is clear that the Third Circuit's interpretation in *Curtis* of prior jurisprudence from the Fifth and Ninth Circuits has been shown to be mistaken; contrary to the belief of the *Curtis* court, those cases do not stand for the proposition that a claimant may receive LHWCA benefits through OCSLA where the underlying accident did not occur on an outer Continental Shelf situs; rather, when these cases are read in conjunction with more recent jurisprudence, it is clear that an accident must have an outer Continental Shelf situs in addition to meeting the "but for" test in order for LHWCA benefits to be recovered through OCSLA. Respondents believe it is probable that, if faced with this issue today, in view of the current state of the jurisprudence, the Third Circuit would decide the issue in the same manner as the Fifth Circuit has done in this case and would conclude that LHWCA benefits may not be recovered through OCSLA where the accident giving rise to the claim for benefits did not have an outer Continental Shelf situs.

For the foregoing reasons, PHI and Wausau submit that the "conflict" between the circuits on the issue of whether an outer Continental Shelf situs is a prerequisite to recovery of LHWCA benefits through OCSLA is simply not sufficiently significant in proportion to justify this Court's consideration of the issue at this time. The Fifth Circuit's conclusion that an outer Continental Shelf situs is required is consistent with the text and purpose of OCSLA and is consistent with language utilized by this Court in its jurisprudence. The only case that has been decided in a contrary manner was decided by the Third Circuit in 1988 and its rationale has been subsequently undermined by more recent jurisprudence, which would likely cause such court to concur with the Fifth and Ninth Circuits if the issue were addressed today. In view of these circumstances, there is no compelling need for this Court to grant the writ sought by petitioner.

IV.

NO MATTER OF NATIONAL IMPORTANCE IS AT STAKE

Petitioner contends that this case raises an issue of national importance because of the number of workers who may be affected by the Fifth Circuit's decision. She further contends that these "Offshore Lands Workers" and their families are being denied "equal protection" guaranteed by the United States Constitution. Despite petitioner's general contentions in this regard, the issue raised by petitioner is not sufficiently significant to justify this Court's grant of the writ sought by petitioner, as has been previously discussed. Further, petitioner does not cite, nor can she cite, any authority to support her argument that "Offshore Lands Workers" are being denied equal protection. These workers do not comprise a recognized class of persons, but rather, are included in the classes of non-seamen that are covered by various state worker's compensation systems. Petitioner in this case, Margie Pickett, is receiving benefits under the Louisiana Worker's Compensation Act, and as such is being treated in precisely the same manner as any other non-seaman or survivor of a non-seaman who is injured or killed on Louisiana soil. This case does not raise a matter of national importance. Rather, this case arises from petitioner's desire to recover the greater benefits available under the LHWCA in lieu of the benefits she is receiving under the Louisiana Worker's Compensation Act. However, the facts of this case simply do not support petitioner's claim for benefits under the LHWCA.

CONCLUSION

For the foregoing reasons, Petroleum Helicopters, Inc. and Wausau Insurance Companies respectfully request that this Honorable Court deny the Petition for Writ of Certiorari submitted by petitioner Margie A. Pickett.

Respectfully submitted,

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No. 01-1042

In the Supreme Court of the United States

MARGIE A. PICKETT, PETITIONER

v.

PETROLEUM HELICOPTERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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29 pp

QUESTION PRESENTED

Section 4(b) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b), extends workers' compensation coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, "[w]ith respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf [OCS] for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources * * * of the outer Continental Shelf." The question presented is whether such coverage is limited to employees who suffer injury or death on an OCS platform or the waters above the OCS.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 266 F.3d 366. The decisions and orders of the Benefits Review Board (Pet. App. 5a-12a) and the administrative law judge (Pet. App. 13a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2001. A petition for rehearing was denied on October 25, 2001 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on January 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 4(b) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b), provides:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section—
>
> (1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
>
> (2) the term "employer" means an employer any of whose employees are employed in such operations; and
>
> (3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

STATEMENT

Petitioner applied for workers' compensation benefits under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1333(b), on account of the death of her husband, who died in a crash of a helicopter during a test flight. The helicopter was used to ferry workers and

equipment to offshore drilling platforms on the outer continental shelf. An administrative law judge (ALJ) denied petitioner's claim, Pet. App. 13a-25a, and the Department of Labor's Benefits Review Board affirmed, *id.* at 5a-12a. On petition for review, the court of appeals affirmed the denial of benefits, relying on its prior decision in *Mills* v. *Director, OWCP*, 877 F.2d 356, 362 (5th Cir. 1989) (en banc).

1. Congress enacted the Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462 (43 U.S.C. 1331-1356 (1994 & Supp. V 1999)), and the Submerged Lands Act, ch. 65, 67 Stat. 29 (43 U.S.C. 1301-1315), to address the division of federal and state authority over submerged lands in the wake of this Court's decision in *United States* v. *California*, 332 U.S. 19 (1947). The Submerged Lands Act granted coastal States title to submerged lands seaward of their coastlines to a distance generally of three miles, subject to specific exceptions. See 43 U.S.C. 1301(b), 1311(a). The OCSLA affirmed the United States' paramount authority over submerged lands seaward of the Submerged Lands Act grant, which is denominated the outer continental shelf (OCS). See 43 U.S.C. 1332(1), 1333(a)(1).

The OCSLA created a body of substantive law to govern the federal submerged lands. Among other things, it extended the Constitution and federal statutes to the OCS, 43 U.S.C. 1333(a)(1), (b), (c) and (f); delegated specific authority to various federal agencies, *e.g.*, 43 U.S.C. 1333(d) and (e), 1334; preserved federal admiralty jurisdiction over the high seas above the OCS, 43 U.S.C. 1332(2); and adopted certain laws of the adjacent States to the extent not inconsistent with federal law. 43 U.S.C. 1333(a)(2)(A). In particular, as relevant to this case, it extended federal workers' com-

pensation coverage under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, to employees injured "as the result of operations conducted on the outer Continental Shelf" for the purpose of extracting natural resources. 43 U.S.C. 1333(b). It is the scope of that coverage that is at issue in this case.

2. Petitioner Margie A. Pickett is the widow of a helicopter pilot, Joseph Pickett, who was employed by respondent Petroleum Helicopters, Inc. Pickett's job was to transport workers and equipment between the mainland and offshore drilling platforms on the OCS off the coast of Louisiana. Pet. App. 2a, 15a. On November 19, 1990, at respondent's heliport in Louisiana, Pickett undertook to perform a flight check that was required by regulation after maintenance has been performed. Passengers may not be carried in the helicopter until the flight check has been successfully completed. If the helicopter had performed satisfactorily, Pickett intended to fly the helicopter to the heliport of the Amerada Hess Corporation to pick up personnel and supplies to be transported to offshore platforms on the OCS. *Id.* at 2a & n.1, 15a-16a. Shortly after liftoff on the test flight, however, the helicopter crashed onto the parking lot next to respondent's heliport, killing Pickett. *Id.* at 2a, 17a.

3. Since Pickett's death, respondent Wausau Insurance Companies has paid petitioner workers' compensation benefits under the Louisiana Workers' Compensation Act. Pet. App. 17a-18a. Petitioner, however, filed a claim for benefits with the United States Department of Labor, Office of Workers' Compensation Programs, under the OCSLA extension of the LHWCA. Petitioner did so because LHWCA benefits are greater than the state benefits.

a. An administrative law judge denied petitioner's claim. Pet. App. 13a-25a. The ALJ considered himself bound by the Fifth Circuit's en banc decision in *Mills* v. *Director, OWCP*, 877 F.2d 356, 362 (1989), which denied OCSLA coverage to a shore-based welder who worked on platforms destined for the OCS. Pet. App. 23a. The *Mills* court established a two-part test, covering "employees who (1) suffer injury or death on an OCS platform or the waters above the OCS; and (2) satisfy the 'but for' status test" described in *Herb's Welding, Inc.* v. *Gray*, 766 F.2d 898, 900 (5th Cir. 1985), *Mills*, 877 F.2d at 362 (*i.e.*, that the injury would not have occurred but for operations on the OCS, *Herb's Welding*, 766 F.2d at 900). Applying that test, the ALJ concluded that he was "compelled to follow the Fifth Circuit's holding, which excludes [Pickett] from coverage as he was over land, albeit rather fortuitously, when the accident occurred." Pet. App. 23a.

b. The Department of Labor's Benefits Review Board affirmed. Pet. App. 5a-12a. Like the ALJ, the Board recognized that this case differs factually from *Mills* because Mills worked only on land in support of OCS operations, whereas Pickett piloted a helicopter to ferry workers to work on the the OCS. *Id.* at 9a. Nevertheless, the Board concluded that "*Mills* forecloses [petitioner's] recovery under the Act" because her husband's "death occurred on land." *Id.* at 11a.

c. On petition for review of the Board's decision, the court of appeals affirmed. Pet. App. 1a-4a. The court acknowledged that *Mills* was "factually distinct" and that its earlier decisions had granted LHWCA benefits to survivors of employees who "died in helicopter crashes on the high seas above the OCS." *Id.* at 3a (discussing *Barger* v. *Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), cert. denied, 461 U.S. 958

(1983), and *Stansbury* v. *Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), cert. denied, 459 U.S. 1089 (1982)). Nonetheless, the court held that "[t]he relevant language in *Mills* is not fact-specific, but categorically requires the injury to occur on the OCS." *Ibid.* It subsequently denied panel rehearing and rehearing en banc. *Id.* at 26a-27a.[1]

ARGUMENT

The Fifth Circuit's decision in this case conflicts with the Third Circuit's decision in *Curtis* v. *Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (1988). After reexamining the legal issue, the Director of the Office of Workers' Compensation Programs has concluded that neither decision correctly articulates the proper test for determining whether the OCSLA applies to the accidents encountered in those cases—the Fifth Circuit's coverage test is too narrow, while the Third Circuit's test is too broad. Nevertheless, the facts of this case are so unusual that it is unlikely to have a significant precedential effect, and it does not present a representative case for this Court to articulate a generally-applicable coverage test for workers' compensation under the OCSLA. In addition, it is possible that the Third Circuit would now adopt either the Fifth Circuit's or the Director's approach if it had occasion to revisit the issue. Finally, the Director has concluded that the result reached by the Fifth Circuit in this case is correct, even though the Director does not agree with the Fifth Circuit's articulated approach in one particu-

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[1] Although nominally a respondent, see *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 519 U.S. 248, 269 (1997), the Director, Office of Workers' Compensation Programs, United States Department of Labor, did not participate in the case below because he considered *Mills* to be controlling in the Fifth Circuit.

lar respect. For these reasons, review of the Fifth Circuit's decision in this case is not warranted.

1. In stating that OCSLA coverage is limited to injuries that occur on or over the OCS, the court of appeals' decision faithfully followed the language of *Mills* v. *Director, OWCP*, 877 F.2d 356 (5th Cir. 1989) (en banc). *Mills* and the decision below, however, conflict with the Third Circuit's decision in *Curtis* v. *Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (1988), which found coverage for an employee who was injured on shore.

In *Mills*, a welder who worked only on land was injured while participating in the building of an oil production platform destined for the OCS. *Mills*, 877 F.2d at 357. Reversing a panel decision, the en banc Fifth Circuit denied coverage. *Id.* at 357-358. The en banc court stated that the "bare language" of Section 4(b) of OCSLA "does not resolve the issue" because the language is "open to interpretation." *Id.* at 359. Nevertheless, the court concluded from the legislative history that "Congress intended to establish a bright-line" test for coverage. *Id.* at 362. It elected to "draw that line" by covering only "employees who (1) suffer injury or death on an OCS platform or the waters above the OCS; and (2) satisfy the 'but-for' status test this court described in *Herb's Welding Inc.* v. *Gray*, 766 F.2d 898, 900 (5th Cir. 1985)." *Mills*, 877 F.2d at 362. The latter prong of the coverage test requires that the employee's "work had furthered the operation of a fixed rig on the shelf and was in the regular course of extractive operations on the shelf," so that the death or injury would not have occurred "but for" those operations. *Herb's Welding*, 766 F.2d at 900.

Curtis, which was decided before the en banc decision in *Mills*, held that the OCSLA covered an

employee injured on shore en route to the OCS. *Curtis*, 849 F.2d at 806. Curtis, who worked regularly on a drilling rig on the OCS off the coast of New Jersey, was injured on the New Jersey Turnpike while driving a company car from his employer's Rhode Island headquarters to meet the helicopter that was to fly him back to the rig. *Ibid.* The Third Circuit held that his injury was covered by the OCSLA. Even though the injury did not occur on or over the OCS, the court read the statutory language to require only that the injured employee "be involved in 'any operations conducted on the [OCS] for the purpose of exploring for, [and] developing * * * the natural resources * * * of the [OCS]," and not to impose a situs-of-injury requirement. *Curtis*, 849 F.2d at 809.[2] It contrasted that language with the narrower language in Section 4(a)(1) of the OCSLA, 43 U.S.C. 1333(a)(1) (1958), which extended other federal substantive law and jurisdiction only to "artificial islands and fixed structures" attached to the Shelf. 849 F.2d at 809. It then discussed a series of pre-*Mills* Fifth Circuit decisions that, although "distinguishable on their facts * * *, support the principle that situs does not control the application of the LHWCA" under the OCSLA. *Id.* at 809-810 & n.9. Like the Fifth Circuit, the Third Circuit adopted a "but for" test to determine "whether Curtis's injury occurred as a result of operations on the [OCS]," and concluded that Curtis met that test. *Id.* at 811.

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[2] *Curtis* actually construed an earlier version of the OCSLA (Section 4(b) and (c) of the OCSLA, 43 U.S.C. 1333(b) and (c) (1958)) than that involved in *Mills* and this case. However, as explained below, pp. 17-18, *infra*, the differences between the two versions are organizational, not substantive.

It is apparent that the Third and Fifth Circuits disagree on whether Section 4(b) of the OCSLA imposes a situs-of-injury requirement and that their disagreement on the applicable coverage test would affect the outcome in this case. Unlike Mills, both Pickett and Curtis were regularly employed in jobs that required them to fly over the high seas above the OCS and to land on offshore drilling platforms in support of operations on the Shelf. Both were also injured on the mainland in transportation that was in some sense related to the OCS, Curtis while driving to the heliport and Pickett at the heliport while conducting an in-air pre-flight test that was required by regulation after mechanical work had been performed on the helicopter, but prior to picking up passengers and supplies for transport to the OCS. Pickett presumably would have been covered by the Third Circuit under the rationale of *Curtis*, as would other employees who are injured or killed on shore or over state waters on the way to or from the OCS.[3]

Nevertheless, the Third Circuit apparently believed that it was following Fifth Circuit case law when it decided *Curtis* shortly before the en banc decision in *Mills*. See *Curtis*, 849 F.2d at 809-811. The earlier Fifth Circuit cases had articulated only the "but for" coverage test, not the two-part *Mills* test (which added a situs-of-injury requirement), although the Fifth Circuit cases had applied the "but-for" test only to injuries that actually occurred on or over the OCS. See *Barger*

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[3] Both circuits, however, will cover employees who die in helicopter crashes in the waters over the OCS. See *Barger* v. *Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), cert. denied, 461 U.S. 958 (1983); *Stansbury* v. *Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), cert. denied, 459 U.S. 1089 (1982); Pet. App. 3a-4a (affirming that *Barger* and *Stansbury* survive *Mills*).

v. *Petroleum Helicopters, Inc.*, 692 F.2d 337, 340 (5th Cir. 1982), cert. denied, 461 U.S. 958 (1983); *Stansbury* v. *Sikorski Aircraft*, 681 F.2d 948, 950-951 & n.2 (5th Cir.) ("OCSLA has no situs requirement"), cert. denied, 459 U.S. 1089 (1982). Because the Third Circuit, when it decided *Curtis*, had no way of anticipating the Fifth Circuit's subsequent change of direction, and because it has had no occasion to address the issue since then, it is at least possible that the conflict in the circuits will be resolved without the intervention of this Court.

2. On the merits, neither the Fifth nor the Third Circuit has yet adopted an OCSLA coverage test that satisfactorily reflects the language, structure, purpose, and history of the statute, as well as the practicalities of OCS operations. The Fifth Circuit test is too narrow because it reads into Section 4(b) of the Act a restrictive situs-of-injury requirement the statutory text does not contain. Section 4(b) of the OCSLA provides LHWCA coverage for "any injury occurring as the result of operations conducted on the [OCS] for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources" of the OCS. 43 U.S.C. 1333(b). It does not say that it covers "any injury occurring on [or over] the [OCS] as a result of operations" for one of the stated purposes, as it would if it mandated the Fifth Circuit's reading. See *Mills*, 877 F.2d at 362-363 & n.1 (Duhe, J., dissenting). "Certainly, Congress knows how to include a situs requirement in a statute when it intends that such a requirement should exist," particularly when an express situs requirement is contained in the LHWCA itself, the statute whose provisions Congress extended in the OCSLA. *Id.* at 363 (Duhe, J., dissenting); see 33 U.S.C. 903(a) (LHWCA applies to an "injury occurring upon the

navigable waters of the United States" and specified adjoining areas).

The Fifth Circuit's approach also disregards textual differences among the subsections of Section 4 of the OCSLA itself, and the maxim that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 432 (1987). For instance, Section 4(a)(1) of the OCSLA provides, in pertinent part:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the [OCS] and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State.

43 U.S.C. 1333(a)(1). By its terms, this jurisdictional provision extends to the OCS itself and to installations actually attached to the subsoil and seabed of the OCS (as well as to pipelines for transporting OCS resources). It does not extend to the waters above the OCS, which remain subject to federal maritime law. See 43 U.S.C. 1332(2) (preserving "the character of the waters above

the [OCS] as high seas").[4] Other subsections also contain explicit situs language. See 43 U.S.C. 1333(c), (d), (e) and (f). To give meaning to the textual difference between Section 4(b) and the other coverage provisions of Section 4, 43 U.S.C. 1333, therefore, an appropriate test would cover at least some injuries that occur outside the geographical limits of the OCS—but only if they "occur[ ] as the result of operations conducted on" the OCS for the specified purposes. 43 U.S.C. 1333(b).[5]

The Third Circuit's test, in contrast, is too broad because, in finding no situs requirement at all, it gives no effect to the statutory phrase "on the [OCS]." See 43 U.S.C. 1333(b). It thus leaves open the possibility of covering purely shore-based employees whose work is merely related to OCS operations, such as Mills, as well

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[4] In that regard, we note that the Fifth Circuit's coverage test extends to injuries occurring over the OCS, not just injuries on OCS platforms attached to the seabed. But there is no textual basis in Section 4(b) for selecting that particular line of demarcation, and there is no logical reason why a helicopter crash into the high seas above the OCS is any more or less the "result of operations conducted on the [OCS]" than a helicopter crash on any other segment of the journey between an OCS platform and the coast, such as a crash on the beach or into state waters.

[5] Respondent Petroleum Helicopters, Inc. (PHI) accordingly errs by relying (Br. in Opp. 7-12) on decisions of this Court construing Section 4(a) of the OCSLA, 43 U.S.C. 1333(a), as limited to events occurring on the seabed, subsoil, and fixed structures attached to the OCS. See *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986); *Rodrigue* v. *Aetna Cas. & Surety Co.*, 395 U.S. 352 (1969). As explained above, Section 4(a) is worded more narrowly than Section 4(b). Thus, the proper inference is that Congress intended to make LHWCA coverage apply more broadly to OCS workers than the provisions of state and federal law incorporated by Section 4(a), and not that the scope of the different subsections is identical, as respondent PHI contends.

as OCS employees like Curtis himself whose injuries are caused by entirely land-based risks (such as driving an automobile). The Third Circuit would be correct, of course, if the Act covered "any injury occurring as a result of operations conducted for the purpose of" exploiting OCS resources, without the limiting phrase "conducted on the [OCS]." But it does not. Thus, neither the Third Circuit nor the Fifth Circuit approach succeeds in giving meaning to all the words of Section 4(b) of the OCSLA. See, *e.g.*, *TRW, Inc.* v. *Andrews*, 122 S. Ct. 441, 449 (2001).[6]

The definitions in Section 4(b) of the OCSLA (which replace definitions of the same terms in the LHWCA itself, 33 U.S.C. 902) offer some help in ascertaining which employees Congress meant to cover. While Section 4(b)(1) identifies only "employee[s]" that are excluded from coverage (seamen and government employees), Section 4(b)(2) defines a covered "employer" as "an employer any of whose employees are employed in such operations." 43 U.S.C. 1333(b)(1) and (2). The term "such operations" must refer back to "operations conducted *on* the [OCS]" for the specified purposes. 43 U.S.C. 1333(b) (emphasis added). It is thus reasonable to infer that a covered "employee" must himself be employed in operations "conducted on the [OCS]" at least part of the time, a reading that excludes purely shore-based workers.

While this Court has never construed Section 4(b) of the OSCLA, it has suggested in dictum that the provision contains both status and situs requirements. See

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[6] The test enunciated by the Third Circuit in *Curtis* is consistent with the position taken by the Director, OWCP, in that case and in *Mills*. Upon further consideration, the Director has revised his previous view of the appropriate construction of Section 4(b).

Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207, 219 n.2 (1986) (noting that Section 4(b) "superimposes a status requirement on the otherwise determinative OCSLA situs requirement"); *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 427 (1985) (OCSLA "draws a clear geographic boundary that will predictably result in workers moving in and out of coverage."). But those decisions—like the Act itself—do not spell out the content of the situs requirement or the location of the geographic boundary, and the Court expressly disavowed construing Section 4(b) in each case. See *Tallentire*, 477 U.S. at 219 n.2; *Herb's Welding*, 470 U.S. at 427-428.

The legislative history of Section 4(b), while far from conclusive, suggests that the drafters intended to fill gaps in state workers' compensation coverage by creating a uniform federal compensation scheme for offshore workers, but does not suggest that Congress meant to extend that coverage broadly to shore-based employees or injuries. When the OCSLA was enacted in 1953, the LHWCA covered only injuries upon actual navigable waters, not injuries upon adjacent structures such as wharves and piers. See *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 214-220 (1969).[7] The Jones Act, 46 U.S.C. App. 688 (enacted in 1915), provided tort

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[7] In 1972 Congress amended the LHWCA to extend coverage to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." See 33 U.S.C. 903(a). Where coverage had previously stopped "at the water's edge," in 1972 "Congress moved the line" landward, *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 259, 260 (1977), because it "was especially concerned that some workers might walk in and walk out of coverage." *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 n.18 (1979).

remedies to seamen, and the Death on the High Seas Act, 46 U.S.C. App. 761 *et seq.* (enacted in 1920), extended admiralty tort remedies to wrongful death cases. State workers' compensation provided the only coverage for workers killed or injured on land. Some States also covered workers based in the State but injured elsewhere, including seamen and offshore oil workers, but such coverage was not uniform. See *Outer Continental Shelf: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 22, 545 (1953) (*Hearings*). The Senate Committee that drafted the OCSLA concluded, among other things, that Congress could not require States to extend state workers' compensation coverage offshore, *Hearings* 25 (Sens. Barrett, Cordon, and Daniel), and had been advised that decisions of this Court raised questions about the constitutionality of such extensions by the States. See *Hearings* 30-31 (discussing *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205 (1917)). As a result, the drafters plainly wanted to fill gaps in workers' compensation coverage for offshore workers.

The legislative history also demonstrates that the drafters chose to adopt uniform federal workers' compensation coverage under the OCSLA, and not coverage that would vary depending on state law.[8] Before extending LHWCA coverage in the OCSLA, Congress had considered other approaches to providing workers' compensation coverage for offshore workers. For instance, early House bills proposed applying the

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[8] That choice is also evident in the contrast between the text of Section 4(b), which extends federal LHWCA coverage without mentioning state law, and Section 4(a)(2)(A), which extends the civil laws of adjacent States to the OCS when federal law does not apply.

workers' compensation laws (and other police powers) of the adjacent States to OCS operations, an approach later rejected. See, *e.g.*, H.R. Rep. No. 215, 83d Cong., 1st Sess. 7-8 (1953); *id.* at 23; H.R. Rep. No. 695, 82d Cong., 1st Sess. 13 (1951). The principal Senate bill, as introduced, incorporated the LHWCA in terms similar to those later enacted, but only "if recovery for such disability or death * * * is not provided by State law." S. 1901, 83d Cong., 1st Sess. § 4(c) (1953), *reprinted in Hearings* 2. S. 1901, as reported, removed that condition, explaining:

> It was deemed inadvisable to have the Federal Longshoremen's and Harbor Workers' Compensation Act apply only if there is no applicable State law. By this amendment, *all workers on the outer shelf* not already protected under laws respecting seamen are protected by the [LHWCA].

S. Rep. No. 411, 83d Cong., 1st Sess. 16, 23 (1953) (emphasis added).[9]

As to the geographic scope of OCSLA coverage, the language emphasized above suggests that the drafters were primarily concerned about workers *on* (or perhaps over) the OCS—not those working in adjoining States —and expected all such offshore workers to be pro-

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[9] Additionally, the members of the Senate Committee that removed the exclusion for workers covered by state law knew that LHWCA compensation levels would generally be more favorable to workers. *Hearings* 31-32, 512. In fact, testimony presented to the Committee by an industry representative indicates that the offshore oil industry was willing to pay higher premiums for federal compensation coverage to obtain uniformity and certainty, rather than to continue a situation in which "operators now cover workmen under both State and Federal compensation laws." *Id.* at 512.

tected either by the LHWCA or by the remedies available to seamen (even if they also happened to be eligible for state workers' compensation in a particular State). The Conference Report makes a similar (although less specific) geographic reference:

> Provision is made for the jurisdiction in the United States district court for cases and controversies arising *on the outer Continental Shelf* and certain Federal laws are made applicable *to the area* such as the Longshoremen's and Harbor Workers' Act.

H.R. Conf. Rep. No. 1031, 83d Cong., 1st Sess. 12 (1953) (emphasis added).

As a consequence of Congress's deliberations, Section 4 of the 1953 Act provided, in pertinent part:

> (b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any *operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf* * * * .
>
> (c) With respect to disability or death of an employee *resulting from any injury occurring as the result of operations described in subsection (b)*, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. * * *

§ 4(b) and (c), 67 Stat. 463 (emphasis added to show language later combined to form text of current Section 4(b), 43 U.S.C. 1333(b)).

The OCSLA was amended in 1978 for various reasons unrelated to workers' compensation. As pertinent here, it deleted former subsection 4(b), which provided jurisdiction for certain cases and controversies, and incorporated its provisions into a new Section 23, 43 U.S.C. 1349. See Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 203(h), 92 Stat. 636; H.R. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 81 (1978). As a result, Congress adopted a "conforming change to section 4(c) of the 1953 OCS Act," by moving language previously in Section 4(b) into Section 4(c) (and renumbering it as Section 4(b)). *Ibid.* As the conference report explained:

> This amendment involves no change in existing law. It was not the intent of the managers to alter in any way the existing coverage of the Longshoremen's Act, nor of other remedies that may be available for injury or death.

H.R. Conf. Rep. No. 1474, *supra*, at 81.

The legislative history thus has its own ambiguities. The 1953 Senate Report's reference to "workers on the outer shelf" and the Conference Report's reference to extending the LHWCA "to the area" of the OCS lend some support to the Fifth Circuit's view that Congress intended to cover only injuries occurring on or over the OCS. Covering "workers on the outer shelf," however, does not necessarily limit coverage to injuries actually occurring there if employees who work on the OCS are injured elsewhere in the course of their employment; it is also plausible that Congress intended to create a class of "OCS workers" who would retain LHWCA coverage wherever their work activities took them. Cf. *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 360 (1995) (Jones Act test for "seamen"). Nor does the deletion of the

provision that would have extended LHWCA coverage only in the absence of applicable state coverage give rise to any unambiguous inference about congressional intent. Congress might have intended to permit OCSLA coverage for some injuries on land or state waters, or might only have meant to assure uniform offshore coverage even for employees connected to States that provide their own offshore workers' compensation coverage.[10]

In the view of the Director of OWCP, the most appropriate test that can be derived from the text and purpose of Section 4(b), and the structure and history of the OCSLA in general, covers employees who work on the OCS in covered operations and are injured on, over,

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[10] Petitioner makes the additional argument (Pet. 10) that the OCSLA's definition of "development"—which includes "platform construction, and operation of all onshore support facilities," 43 U.S.C. 1331(*l*)—precludes imposition of any situs requirement for workers' compensation coverage under the Act. But Section 4(b) of OCSLA does not use the term "development"; instead, it refers to "operations conducted on the [OCS] for the purpose of * * * developing" natural resources. In fact, the word "developing" is also used in Section 4(a)(1) of the OCSLA, in conjunction with an express situs requirement. Thus, the word "developing" does not necessarily eliminate situs considerations. In addition, the legislative history of the definition of "development," added in 1978, makes clear that it was added to the Act for a purpose unrelated to LHWCA coverage—namely, "to identify the point, after exploration and before development, beyond which activity cannot proceed without an approved development and production plan, as described in [43 U.S.C. 1351]." See *Mills*, 877 F.2d at 360 (quoting from H.R. Rep. No. 590, 95th Cong., 1st Sess. 126 (1977)). Thus, while the definition suggests a broad concept of OCS "operations," it was not intended to alter or clarify the scope of LHWCA coverage under the OCSLA. It therefore sheds no light on the intent of Congress in enacting the LHWCA coverage provisions in 1953.

or en route to or from the OCS by air or sea. That test would contain both a status and a situs component. The status component covers employees involved in covered OCS operations at the time of injury; it is thus the equivalent of the "but for" test adopted by both the Third and Fifth Circuits. See *Curtis*, 849 F.2d at 811; *Herb's Welding Inc.* v. *Gray*, 766 F.2d 898, 900 (5th Cir. 1985). It differs, however, from the pure status test proposed by petitioner, which would create a class of "Offshore Lands Workers," analogous to Jones Act seamen, who work regularly on the OCS but carry their status with them elsewhere. Compare Pet. 11 (discussing *Chandris, Inc.* v. *Latsis*, *supra*), with PHI Br. in Opp. 12-13 (arguing that petitioner's seaman analogy is inappropriate because of differences in the text and purpose of the Jones Act, 46 U.S.C. App. 688, and Section 4(b) of the OCSLA).

The situs component of the government's proposed test would cover injuries that occur on, over, or en route to or from the OCS by air or sea. It would include injuries from the point of departure to, and return from, the OCS by helicopter or boat trip, including those portions that occur over state waters or dry land. It draws a geographical boundary at the point of embarkation for the OCS (*i.e.*, the heliport or boat dock), and so would not cover Curtis's injury while driving to the heliport or Mills' injury while welding a platform under construction at a mainland facility.

The government's proposed test has the practical advantages of a bright-line rule, while avoiding the unfairness and arbitrariness of covering employees only for part of a journey to or from the OCS, when the same transportation purpose and similar hazards are present throughout that journey. It also provides a clear line for limiting OCSLA coverage on the landward side of

the employee's departure point for the OCS, where the work-related activity may have other purposes, the typical hazards are quite different, and Congress knew that state workers' compensation coverage always applied and thus would not have perceived a need to fill any gap. In this case, for example, the flight test apparently was required by governing regulations because mechanical work had just been performed on the helicopter, without regard to whether the helicopter was then going to travel to the OCS or elsewhere; the risks attendant to the test flight accordingly were not related to operations on the OCS but rather to maintenance of helicopters; and Pickett's injury was and is covered by Louisiana's workers' compensation law.

Moreover, compensating injuries and deaths of workers that occur during a trip to or from operations on the OCS (over land, state waters or the high seas) is more central to the purposes of the OCSLA than compensating injuries on the mainland before or after such a trip. As a result, the Director's test would cover more injuries than the Fifth Circuit test, but not more workers; it would simply cover them for a somewhat larger portion of their working hours; and it would reduce (but not entirely eliminate) the likelihood that workers would regularly move in and out of OCSLA coverage. Finally, as discussed at pp. 10-19, *supra*, the Director's test is the most faithful to the text, legislative history, and purposes of Section 4(b).

3. Under the test just described, this case was correctly decided. Petitioner's husband was injured during a flight check following maintenance of the helicopter, rather during the actual trip to the OCS. See Pet. App. 16a. He therefore would not fall within the OCSLA's coverage. Although the Fifth Circuit did not articulate the test for coverage that the Director now

believes is appropriate, it reached the correct result under the facts of this case.

The formulation used in the court of appeals' decision, if strictly adhered to by the Fifth Circuit in the future, would lead to the persistence of a an OCSLA coverage test that, in the Director's view, is too restrictive in the narrow respect discussed above concerning certain segments of direct transportation to and from the OCS. The Fifth Circuit, however, has not to date addressed a case involving transportation by helicopter or boat to or from a work site on the OCS in which the injury occurs over land or state waters before reaching, or after leaving, the OCS. It may be that, if it considered the issue in a case in which the Director had taken the position in the administrative proceedings that the OCSLA covers such an injury, the Fifth Circuit would defer to and sustain that interpretation. See *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997) (discussing deference to the Director).

The articulation of the test by the Fifth Circuit also is inconsistent, in principle, with that of the Third Circuit. See *Curtis*, *supra*. It is possible, however, that the Third Circuit would eventually fall in line with the *Mills* test, if and when similar cases arise in that circuit. In the alternative, the Third Circuit might adopt the Director's proposed test. In either event, the issue is not yet ripe for this Court's determination.

Furthermore, the facts in this case—like those in *Curtis*—are atypical, because they involve an injury on shore that occurred shortly before, rather than during, a trip to the OCS. Every worker on an OCS oil rig travels back and forth to his or her place of employment by air or water and could be injured at any point during those travels. Such trips pose risks (such as drowning) that were foreseeable by the OCSLA's drafters and are

generally different in kind from those typically encountered on a highway, in a shipyard, or at a heliport. The specific risk in this case – arising from a pilot's post-maintenance flight check of a helicopter – is more peripheral to the concerns of the Act (and also presumably rarer) than the risk of accidents en route to or from the OCS, which would be covered under the Director's proposed test.

Aside from the particular facts of this case, the general question of OCSLA coverage potentially affects a significant number of OCS workers within the jurisdiction of the Fifth Circuit, but currently affects relatively few elsewhere. Some 4200 OCSLA injuries and deaths have been reported since 1997 to the Labor Department, and all but 123 of them were reported to district offices within the jurisdiction of the Fifth Circuit. In addition, the Minerals Management Service of the Department of the Interior reports that some 35,400 persons currently work offshore in the Gulf region, where the vast majority of current offshore oil and gas operations take place. See U.S. Dep't of Interior, Minerals Management Service, *OCS Activities Report, October 2000-May 2001*, at 53-71 (2001) (visited Apr. 11, 2002) (discussing activities by region) <www.gomr.mms.gov/homepg/offshore/safety/overview.html>. As explained above, however, the Director believes that the Fifth Circuit is largely correct in its approach to the situs issue, with the exception of a case (which has not yet been addressed by the Fifth Circuit) in which the injury occurs in the course of transportation by helicopter or boat to or from a work site on the OCS but before the helicopter reached, or after it has left, the OCS. There is accordingly no basic misconception by the Fifth Circuit that warrants review by this Court.

While only a few of the numerous OCS workers in the Fifth Circuit are likely to be helicopter pilots who perform flight checks, all of them travel back and forth to the OCS and thus could be killed or injured during any segment of such journeys. Therefore, while we do not think it necessary for the Court to review this case, it may wish to consider the coverage question in a future case, if the Fifth Circuit addresses a case involving actual transportation to or from the OCS or if the Third Circuit adheres to the *Curtis* formulation notwithstanding the intervening Fifth Circuit decision in *Mills* and the Director's new position. At the present time, however, review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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